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MATERIALS ON CONFLICT OF LAWS

Volume 1F

Professor John Swan

and

Professor Vaughan Black

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> The court will not exercise jurisdiction if it is a seriously inappropriate forum for the trial of the action so long as an appropriate forum is available to the plaintiff or if he has an adequate remedy abroad. In exercising its discretion the court will also weigh the relative advantages and obstacles to a fair trial. Will the plaintiff be prejudiced by having to sue in the foreign country? The substance of the plaintiff's action must also be considered. To what extent is it connected with the forum? Under the doctrine of *forum conveniens*, the court's assumption of jurisdiction must always be clearly justified. In other words, the plaintiff's choice of jurisdiction must not be oppressive or vexatious, or an abuse of process.

It must also be remembered that the decision of Judge Hall was made in the exercise of his discretion and should not be interfered with unless it is shown that he erred in the exercise of such discretion by scting on some wrong principle of law or if other grounds establish that the manner in which he exercised his discretion would result in some injustice being done. In my opinion, no such error or grounds have been established by the appellant.

In the result I would grant leave to appeal but would dismiss the appeal with costs.

Notes

1. For a more recent example, see Ichi Canada Ltd. v. Yamauchi Rubber Industry Co. (1983), 43 B.C.L.R. 215, 144 D.L.R. (3d) 533 (B.C.C.A.), affirming (1982), 36 B.C.L.R. 100, 134 D.L.R. (3d) 396; Pindling v. NBC (1984), 49 O.R. (2d) 58, 14 D.L.R. (4th) 391, (H.C.) In this case the Prime Minister of the Bahamas brought an action against NBC for defamation, the trial judge refused to set aside the service ex juris.

2. The issue of jurisdiction raised in Robinson v. Warren had a direct impact on the choice of law rule applicable on the merits for, under Phillips v. Eyre, the choice of forum by the plaintiff determines for all practical purposes the choice of law issue in the case.

3. In Charlottetown Metal Products Ltd. v. Miles Refrigeration Co. Ltd. (1980), 30 Nfld. & P.E.I.R. 190, 115 D.L.R. (3d) 63, aff'd, sub nom. Charlottetown Metal Products Ltd. v. Lucas-California Co. (1982), 36 Nfld. & P.E.I.R. 115, 134 D.L.R. (3d) 438 (P.E.I. C.A.), another case under the very broad rules of Prince Edward Island, the court considered the appropriate test to determine the extent of the plaintiff's power. MacDonald J. said: (115 D.L.R. (3d) 63, 71,72)

3. The Constitutional Component

The rules which we have just been discussed have been largely developed from English rules. In only a very few cases has any mention been made of the fact that, unlike England, Canada is not a unitary state but a federal one. The importance of this fact is that a mechanism exists to control excessive assertions of provincial power. The Supreme Court of Canada can, as we saw in Moran v. Pyle National (Canada) Ltd. (supra, p. 226), authoritatively determine the circumstances under which the Saskatchewan courts can assert jurisdiction over an Ontario resident. When the Supreme Court heard the appeal in Moran it was sitting both as the final court of appeal for Saskatchewan and as a national court. One would, for example, expect the same result to follow if the court were hearing an appeal from Newfoundland or British Columbia. A national perspective on the issue of the power of one province to permit service ex juris is very important. We will see in the next chapter that the development of such a perspective is essential for the rational solution of the problem of recognizing and enforcing judgments of foreign courts.

An example of the situation where the issue of jurisdiction has an overtly constitutional dimension is provided by the following American case. Most of the important cases are referred to in the judgment. Some brief background to the case might be of interest. The accident out of which the litigation arose occurred in Creek County, Oklahoma. Creek County juries are famous (or notorious) for the generosity of their damage awards. The parties had, therefore, important financial concerns in the outcome of the litigation. The respondent in the case in the Supreme Court is the District Judge for Creek County. The form of the action is that the appellants seek a writ of prohibition against the judge who is the named respondent. He is, of course, represented in effect by the plaintiffs. The Fourteenth Amendment to the U.S. Constitution is:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

of the trial would work some special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests.

The considerations other than contacts between the forum and the defendant are relevant necessarily means that the Constitution does not require that trial be held in the State which has the "best contacts" with the defendant.

The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum. Under even the most restrictive view of International Shoe, several States could have jurisdiction over a particular cause of action. We need only determine whether the forum States in these cases satisfy the constitutional minimum.

Questions and Notes

1. Compare the approaches of the Canadian and U.S. Supreme Courts as they are outlined in Moran (supra, p. 226) and World-Wide Volkswagen, and consider the following questions:

(a) To what extent are the concerns of the two courts the same?

(b) Can the Supreme Court of Canada avoid all the complexities of the U.S. position?

(c) To what extent is Canada hampered in its effort to develop satisfactory rules by the fact that there is nothing equivalent to the Fourteenth Amendment in the Charter?

2. The American Supreme court backed off somewhat from the fairly strong pro-defendant bias in World-Wide Volkswagen in Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinée (1982), 102 S. Ct. 2099 (hereafter CBG). It seems unlikely that the latter case represents a significant new departure, though it is, in the long run, doubtful if World-Wide Volkswagen really has created what one commentator has called "a

plaintiffs' hell and a defendants' paradise". (Kamp, "Beyond Minimum Contact; The Supreme Court's New Jurisdictional Theory" (1980), 15 Georgia L. Rev. 19, 53. See also Keeton v. Hustler Magazine (1984), 104 S. Ct. 473, and Calder v. Jones (1984), 104 S. Ct. 1482, two multi-state libel actions which the Supreme Court considered after CBG. See also, Shaffer v. Heitner (1977), 433 U.S. 186, 97 S.Ct. 2569; Kulko v. Superior Court (1978), 436 U.S. 84, 98 S. Ct. 1690; Rush v. Savchuk (1980), 444 U.S. 320, 100 S.Ct. 571.

3. In an ideal federal system what would the rules regarding inter-provincial "long-arm" judicial jurisdiction (i.e., the rules regarding service ex juris) look like? You should re-consider this question as you read the cases in the next section dealing with the Recognition and Enforcement of Foreign Judgments.

4. The new Charter of Rights and Freedoms provides in s. 7 only:

> s. 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

There is no mention of "property rights" and we would have to worry about the degree of coincidence between "due process" and "the principles of fundamental justice".

5. Could something be made of the first part of s. 15(1)? S. 15(1) provides:

> s. 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

4. Some Special Problems and Review

There have been a number of recent international events that are both politically important and interesting from a conflicts perspective. The events include the Entebbe hi-jacking, the "Ocean Ranger" disaster and the activities of the Uranium Cartel. The last, because it has been so strongly fought in the courts, offers an interesting and useful insight into some important conflicts issues.

During the "cold war" immediately following World War II and the first use of nuclear power, growth of the uranium industry was encouraged by the United States and the United Kingdom. Canada, among other countries, was a beneficiary of this programme. This period of encouragement did not last long. Four important factors emerged:

(1) it was decided not to encourage the production of uranium for weapons purposes;

(2) the U.S. developed protectionist policies in favour of its own producers;

(3) a viable commercial market for uranium developed only very slowly; and

(4) large reserves of Australian uranium threatened to flood the market.

The uranium industry in Canada was developed and financed on the basis of firm, favourable purchase agreements from the United States Atomic Energy Commission (U.S.A.E.C.) and the United Kingdom Atomic Energy Authority (U.K.A.E.A.). From 1959 to 1966 the U.S. reduced and then stopped its purchases. In 1966, the U.S.A.E.C. prohibited the use of foreign uranium in U.S. reactors, and later declared that its embargo would continue until the late 1970's. In addition, the U.S. itself began exporting uranium to Germany.

Canada considered the uranium industry to be an essential part of its nuclear programme and an important contributor to its balance of payments and to employment in northern communities. As well, the development of uranium had been constitutionally declared to be for the general advantage of Canada. Stockpiling and domestic incentives were not enough to encourage the exploration and development which were seen as necessary to meet what was projected as the demand of the 1980's. In 1972 a cartel of Canadian, South African, Australian and French producers was formed to agree on international prices. The price of uranium

was $4.00 - $5.00 per lb. at the time. In Canada, producers were prohibited from exporting unless the Atomic Energy Control Board approved of the price levels and quantities and these were fixed (and bids were rigged) by the cartel's office in Paris. The world price of uranium rose faster than expected so that the cartel ceased to operate in 1975. By 1977 the price reached $40.00 per lb.

The litigation which was triggered first by the increase in price and then by the disclosure of the existence of the cartel was enormous. Westinghouse, a large U.S. nuclear reactor builder, had been selling its reactors along with a guaranteed supply of uranium at a fixed price (about $8 - $10 per lb.) for the life of the reactor. When uranium prices reached $26 per pound in 1975, Westinghouse refused to supply uranium to its customers at the contract price. Westinghouse's customers brought 13 actions in the United States Federal Court in Virginia (see In re Westinghouse Electric Corp. Uranium Contracts Litigation (1975), 405 F. Supp. 316). In 1978 the court ruled against Westinghouse and the actions were settled at a cost to Westinghouse of $950 million (see Pikna, "The Uranium Cartel Saga - Yellow Cake and Act of State: What Will Be Their Eventual Fate?" (1980), 12 Case Western Reserve J. Int'l L. 591, 606). Westinghouse then claimed $6 billion in damages in an antitrust action against 26 U.S. and foreign producers who had, allegedly, been the beneficiaries of the efforts of the members of the cartel. American anti-trust legislation allows the recovery of treble damages in successful private actions (Westinghouse faced losses of about $2 billion on its contracts).

The American courts ordered the uranium producers, including the Canadian producers, to provide documents on discovery. The Canadian producers were prohibited from providing any evidence of the cartel under regulations made under Atomic Energy Control Act, R.S.C. 1970, c. A-19, Uranium Information Security Regulations, P.C. 1977-2923, SOR/77-836. The American courts nevertheless asserted jurisdiction over the foreign producers: Westinghouse Electric Corp. v. Rio Algom Ltd. (1978), 448 F. Supp. 1284 and Re Uranium Antitrust Litigation (1978), 458 F. Supp. 1223. The American orders for the production of documents were refused enforcement in Ontario (Re Westinghouse Electric Corporation and Duquesne Light Company (1977), 16 O.R. (2d) 273; 78 D.L.R. (3d) 3, (High Ct.)) and in England (Rio Tinto Zinc v. Westinghouse Electric Corporation, [1978] 2 All E.R. 434 (H.L.)). The president of Rio Algom Ltd. (one of the Canadian producers) was held in contempt for refusing to answer Westinghouse's subpoena (mentioned in Re Westinghouse Electric Corp. Uranium Contracts Litigation (1977), 563 F. 2d 992 (10th Cir., C.A.), but this holding was reversed by the Court of Appeal. Gulf Oil Corp., one of the defendants in the anti-trust action, applied to the Supreme Court of Canada to have the order

for production of documents enforced, but enforcement was refused: (Gulf Oil Corp. v. Gulf Canada Ltd., [1980] 2 S.C.R. 39, 111 D.L.R. (3d) 74.

The American response to the refusal of the foreign producers to the orders for discovery was to permit judgment to go by default: In re Uranium Antitrust Litigation (1979), 473 F. Supp. 382. The principal action by Westinghouse for treble damages was brought in Illinois. Another action was brought in New Mexico in a state court by United Nuclear Corporation (UNC) to have contracts it had with General Atomic Company (GAC) set aside on the ground that the price of uranium had been affected by the cartel. UNC, a supplier to utilities sought damages of $2 billion from GAC. Gulf Oil Corp., the U.S. parent of the Canadian producer, Gulf Canada Ltd., was implicated in the New Mexico action and was alleged to have shipped documents to Canada where they would be protected by the Canadian Regulations. Once again the arguments of the producers and the Canadian government that the American antitrust actions violated Canadian sovereignty were given short shift.

The ineffectiveness of the sovereignty argument is summarized by J.A. Aucoin in Extraterritoriality and the Uranium Cartel: A Legal Analysis (1982), LL.M. thesis, U. of T.) at pp. 48-49:

> However, these interventions were of little assistance to defendants before the American courts. For example, when GAC found itself unable to comply with UNC interrogatories which requested documents protected by the Canadian Security Regulations, the New Mexico Court found it guilty of the "utmost bad faith" and refused to excuse it. Moreover, Judge Felter stated that "deference to the sovereignty and national interest of Canada or its provinces cannot be accomplished through the sacrifice of the sovereignty of New Mexico." ["Court in New Mexico demands uranium documents in Canada." Globe & Mail, (Nov. 23, 1977) 10.] Finding GAC in default, Judge Felter assessed damages on the facts which appeared in the plaintiff's brief.
>
> Sovereignty fared no better in Chicago than it had in New Mexico. In the Westinghouse litigation, Judge Prentice Marshall granted Westinghouse's request that final judgment be filed against nine defaulting defendants on the grounds that their "wilful and deliberate avoidance of those charges ... require[d] that they be held promptly accountable." [Re Uranium

PART III

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

1. Introduction

A party who has obtained a judgment in a foreign jurisdiction may, under circumstances to be investigated, be able to have that judgment given effect in another jurisdiction. Recognition refers to the process by which the foreign judgment is regarded as validly determining some dispute between the parties. Enforcement refers to the process by which the foreign judgment is transformed into a judgment of the forum upon which execution can be levied. The process of recognition will be relevant if nothing other than the conclusiveness of the foreign judgments is in issue. If one party has a foreign judgment of divorce, recognition, if given, will have the effect that the marriage is regarded as dissolved in the recognizing jurisdiction. Similarly recognition alone is in issue if the foreign judgment is in favour of the defendant. The largest practical problems centre on enforcement. The plaintiff who has successfully sued the defendant in, say, Ontario, wants to get the judgment enforced in British Columbia so that he can force the defendant, who, we may assume, has assets in British Columbia (but not in Ontario), to pay.

At common law, a foreign judgment created a debt upon which an action could be brought in the English courts. It was technically an action of assumpsit. A successful foreign plaintiff might be unable, as we shall see, to sue on the judgment, in which case he could sue on the original cause of action. Such a proceeding exposed him to the risk that the English court might not agree on the merits with the foreign court. (Remember the rules of Phillips v. Eyre). Unless the defendant could argue that the foreign judgment had some preclusive effect on the plaintiff's claim, a foreign judgment did not restrict the plaintiff's choice. The rules regarding the preclusiveness of a foreign judgment are very similar to the domestic rules of res judicata, though, technically a foreign judgment is not res judicata. In practice, however, great care must be taken in wording the pleadings if the right to start an original action is not to be lost (see O'Nory v. Patricia Properties Ltd. (1983), 144 D.L.R. (3d) 742 (B.C.S.C.)). A foreign judgment, being for a liquidated sum (and only a final judgment for a fixed sum can be enforced) could be enforced by a specially endorsed writ, or its equivalent under the new Ontario rules. Recent legislation has provided an even more expeditious remedy, though, apart from this effect, it has not changed the rules in any other way. We will examine the statutory rules in Section 4.

The common law rules regarding the enforcement of foreign judgments, as they have been developed in Canada and England by both courts and text-writers, are good examples of the problems that arise from the failure to inquire into the purpose and justification of the rules. It is worthwhile to take some time to explore these issues.

The basic rule regarding the enforcement of foreign judgments in personam is that the rendering court must have had jurisdiction in accordance with the rules of the enforcing court. In spite of some very serious problems with this rule (to be mentioned im a moment) and some narrow exceptions, the rule as stated here is very well established. The leading cases establishing the rules are: Buchanan v. Rucker (1808), 9 East. 192, 103 E.R. 546 (K.B.); Schibsby v. Westenholz (1870), L.R. 6 Q.B. 155, 40 L.J. Q.B. 173 (Q.B.); Emannuel v. Symon, [1908] 1 K.B. 320 (C.A.); Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670 (P.C.). This rule is of very respectable antiquity and is very well established. It is accepted by the following authors: Dicey and Morris, The Conflict of Laws, 10th Ed., Rules 181, 185; Cheshire and North, Private International Law, 10th Ed., pp. 632 et seq.; Castel, Canadian Conflict of Laws, Vol. 1, p. 421; Hertz, Introduction to Conflict of Laws (Toronto: Carswell Co. Ltd., 1978); Sharpe, Interprovincial Products Liability Litigation (Toronto: Butterworths, 1982); McLeod, The Conflict of Laws (Calgary: Carswell Legal Publications, 1983) Part IV.2. A general statement of the rule is that Canadian courts will recognize and enforce a foreign judgment for money when the defendant was personally served in the jurisdiction of the foreign court or submitted (or agreed to submit) to the foreign court's assertion of jurisdiction.

What is the purpose of these rules? A partial response to this inquiry is that it is in the interests of both the litigants and society in general that the costs of dispute settlement be minimized. A party who has litigated his dispute in a foreign tribunal should not be forced to re-litigate all the issues over again. This reasoning applies whether the plaintiff or defendant has been successful in the original proceedings.

As has been mentioned, there is an obvious and close analogy to the domestic rules of res judicata; an issue once litigated cannot be litgated again by the same parties. An issue that has become res judicata cannot be re-litigated because the original cause of action has merged in the judgment: there is nothing left of the original cause of action except the judgment. A foreign judgment does not operate as res judicata, for the original cause of action is not merged in the foreign judgment. As we shall see, this is an important fact. Regardless of this difference, the purpose of the rules is the same in both areas.

A more general purpose for the rules would emphasize fairness and justice: a person who has had his day in court, and who has lost, should not put upon the other party the risk of re-litigation and the consequent risk of a diffeent result being reached by the court. In addition, of course, there is the old maxim: "Interest reipublicae ut sit finis litium" - it is the interest of the state that litigation be brought to an end. (An excellent and much fuller discussion of the issues arising on recognition and enforcement is found in Von Mehren & Trautman, "Recognition of Foreign Adjudications: A Survey and Suggested Approach" (1968), 81 Harv. L.R. 1601.)

Neither efficiency nor fairness is so strong as to justify the enforcement of any foreign judgment. Such a result, fairly obviously, could not be accepted: the foreign court may have behaved in a way that the enforcing court finds offensive or, at least, not so clearly satisfactory as to create the pressure to bring the parties' dispute to a conclusion by recognizing the foreign judgment.

There are at least three ways in which the foreign court could behave that the enforcing court might find offensive.

1. The foreign court might have asserted jurisdiction in ways that are unfair to the defendant. The foreign court might have ignored considerations of forum non conveniens or might have used unreasonable and arbitrary powers of arrest and seizure to bring the defendant before it.

2. The proceedings might have been unfair: the defendant might have had no way of making an effective defence. He might have received no notice of the plaintiff's claim or of the proceedings, and may have been denied the right to make an effective answer to the claim. The judge or other official might have been bribed.

3. The foreign court might have reached the wrong conclusion on the merits of the dispute. The court might have applied the wrong law in the conflicts sense or if it got that right, it might have applied the wrong rule, possibly even a rule of the enforcing court.

In reaching a satisfactory solution to these issues we need to find some criteria by which we can sensibly determine whether what a foreign court did should be regarded as offending any of our concerns. If we take the last one first, we could draw an analogy to the process of review of administrative action. If the foreign court had jurisdiction, then what it does can be accepted as one of the risks run by the defendant. The analogy

is easily seen in cases like Goddard v. Gray (1870), L.R. 6 Q.B. 139, 40 L.J. Q.B 62 (Q.B.) where the fact that the foreign court applied English law incorrectly was not a ground upon which the foreign (French) judgment could be refused recognition. See also Tracomin S.A. v. Sudan Oil Seeds Co. Ltd., [1983] 1 W.L.R. 662, [1983] 3 All E.R. 140. The same situation arises in the fraud cases, i.e., where the defendant alleges that the foreign judgment was obtained by fraud, Jacobs v. Beaver (1908), 17 O.L.R. 496 (C.A.) but c.f. Syal v. Hayward, [1948] 2 K.B. 443, [1948] 2 All E.R. 576 (C.A.). This is only one possible view to take. The standard might just as easily be that, while a large scope may be left to the foreign court on the merits, certain decisions may be offensive. The most obvious candidate for such offensiveness would be the unjustified application of forum law. Thus, suppose that a Canadian court is asked to enforce a judgment of a foreign court and it is proved that that court always applies its own law if it takes jurisdiction regardless of the factual context for the dispute. Such a choice of law rule might well be regarded as objectionable. (It is, as a matter of interest, the rule that a Canadian court will apply in any divorce proceeding before it.) It is, of course, not the purpose of this analysis (at least at this point) to say that such a view represents the common law or what the law should be. It is only to suggest what might be the justification for certain possible rules that might be adopted to determine whether a foreign judgment should be enforced or not.

The second ground for objection expresses the general concern of common law courts for natural justice: the right of a person affected to a fair hearing before an impartial tribunal. It might be expected that, in general, the standard to which the foreign court will be held will be approximately that of the enforcing court. For example, if the enforcing court allows substituted service, a foreign judgment obtained on that basis should not be refused recognition or enforcement simply because the defendant did not receive actual notice. Similarly rules of evidence, admissibility, competence, compellability and privilege would, presumably, cause the enforcing court no problem if they were roughly similar to its own. By and large, these two grounds for objection to foreign judgments have been handled in satisfactory ways. The same is not true of the first.

The first ground could, in principle, be seen as subject to the same standards as the second. Why should a court that is asked to enforce a foreign judgment object if the foreign court allowed service ex juris in circumstances when it would do so itself? If an Ontario court, ex hypothesi, sees nothing offensive in subjecting a foreign defendant to its jurisdiction because the plaintiff's claim falls within one of the "pigeonholes" of Rule 17.02 (Ont.) or Rule 13 (B.C.), why should it regard a foreign court as behaving improperly in doing the same?

The argument is, of course, even stronger if the foreign court acknowledged (as might the Canadian court) the importance of the issue of forum non conveniens.

One particular problem must be briefly noted here. The common law rules are most obviously applicable as regards service on individual people. Special problems arise with corporations. The rule formally remains the same; the defendant must have been properly served for the foreign court to have jurisdiction. Generally speaking, the requirement means that the corporation must have been carrying on business in the place where it was served. The Rules of Court of each of the provinces usually specify the method of service on the corporation; Ontario Rules of Civil Procedure, Rule 16.02, British Columbia, Rules of Practice, Rule 11, Nova Scotia, Civil Procedure Rules, Rule 10.03. The test would probably be the same for recognition purposes, i.e., a corporation that would be "carrying on business" in a province for purposes of supporting the assertion of judicial jurisdiction, would probably be held to have been properly served in that jurisdiction for the purposes of enforcement. Sharpe, Interprovincial Products Liability Litigation, at p. 46 observes that there is surprisingly little authority. He refers to one case, Sfeir & Co. v. National Insurance Co. of New Zealand, [1964] 1 Ll.L.R. 330 which adopted the rule laid down in a case of neither recognition nor judicial jurisdiction, but one of the situs of a debt: Jabbour v. Custodian of Israeli Absentee Property, [1954] 1 W.L.R. 139, [1954] 1 All E.R. 145. See also Frederick Jones Inc. v. Toronto General Insurance Co., [1933] O.R. 428, [1933] 2 D.L.R. 660 (C.A.), Vogel v. R. and A. Kohnstamm Ltd., [1973] Q.B. 133, [1971] 2 All E.R. 1428, Mahon/More Group of Co. Ltd. v. Mercator Enterprises Ltd. (1978), 31 N.S.R. (2d) 327, 90 D.L.R. (3d) 590 (sub nom. Moore v. Mercator Enterprises Ltd) (T.D.). The issue of personal service will not be further referred to.

Note

The kind of clause found in this case is fairly standard boiler-plate in many American standard form contracts. The wording is often exactly similar to that found in the case. These clauses are normally subject to the usual controls on contract power: the power to control unconscionable conduct on the part of one of the parties. See, e.g., Jackson and Bollinger, Contract Law in Modern Society, 2nd Ed. (St. Paul: West Publishing Co., 1980) pp. 806, 807. A more comprehensive list of cases is found in Mandel, The Preparation of Commercial Agreements, 1978 Edition, (New York, Practising Law Institute 1978) p. 69. It might have been expected that the judge would have treated the clause with more hostility, given the view of the courts as to exemption clauses generally. The difficulty facing the defendant would be the usual focus on the nature of the clause - Is it an "exemption" clause (whatever that might be)? - rather than on the function of the clause in the context of the parties agreement.

Submission through the making of an unconditional appearance and of a defence on the merits, raises a very awkward problem: one that can cause a lawyer a great deal of difficulty, agony and concern for her insurance coverage. A lawyer acting for a client in Ontario may be asked for advice when the client is sued in, for example, British Columbia, after having been served ex juris under the Rules of Court of the British Columbia Supreme Court. If the client has a basis for arguing that the British Columbia court should not take jurisdiction under its own rules, should the client appear before the British Columbia Court to argue this point? The choice before the client may be between a default judgment in British Columbia (which may be unenforceable in Ontario because made without jurisdiction) but which may catch any assets that the client may have or later bring into British Columbia, or a judgment possibly enforceable in both British Columbia and Ontario because of a voluntary submission by appearance in British Columbia. The dilemma of the client (and his lawyer) is well illustrated in the next case. Most of the leading cases in the area are mentioned in the judgment.

Notes:

1. The decision of the English court of Appeal has not been accepted in Canada. In Re McCain Foods Ltd. (1979), 26 O.R. (26) 758, 769; 103 D.L.R. (3d) 734 (C.A.) it was said (by Blair, J.A.)

> In dismissing this appeal we are not to be taken as approving the view of Cromarty, J., that the [defendants] by entering a conditional appearance and applying to set aside the writ voluntarily attorned to the jurisdiction of the New Brunswick Court and, consequently, were bound by that court's decision. This view was founded upon Harris v. Taylor, [1915] 2 K.B. 580, and Henry v. Geoprosco Int'l Ltd., [1976] Q.B. 726, which decisions have attracted considerable criticism. There is no need to consider these authorities for the purposes of our decision in the case. We do not consider ourselves bound by them and we reserve our view on them for another day.

The effect is that counsel for a defendant served ex juris may find it easier to tread the narrow line between submission and an appearance solely to dispute the jurisdiction of the foreign court. But while the line here may be wider than in England, it is, nevertheless, a narrow one and counsel has to be very clearly aware of the limits he must respect. Any invitation to the court to discuss the merits of the case will be foolish.

2. In Clinton v. Ford (1982), 37 O.R. (2d) 448, 137 DLR (3d) 281 (C.A.) the issue concerned the enforceability of a South African judgment. In 1976 the parties were both resident in South Africa. The defendant (a solicitor) agreed to buy a car from the plaintiff. The defendant repudiated the contract, and in 1977 he moved to Ontario. In 1978 the plaintiff started proceedings in South Africa and obtained an interim order for the seizure of land in South Africa belonging to the defendant. The defendant delivered the equivalent of a Statement of Defence and defended the action on the merits, but took no further part in the proceedings. The plaintiff sought enforcement of the judgment in Ontario.

Houlden, J.A. giving the judgment of the Court, referred to Henry v. Geoprosco International Ltd., to Dicey & Morris (10th Ed. 1980 vol. 2, pp. 10-50) and the question asked by the editors regarding that case: "How far does this represent the common law rule?", and quotes their answer: (p. 451 (O.R.), p. 285 (D.L.R.))

> First, it is clear that an appearance is not involuntary at common law merely because it is motivated by the fact that the defendant has property within the jurisdiction of the foreign court on which execution may be levied in the event of judgment going against him by default; still less is an appearance involuntary when it is made because, although the defendant has no property within the jurisdiction of the foreign court, his business often takes him there, so that the judgment might be made effective against him. Secondly, an appearance is not involuntary when it is made after execution has been levied under the judgment in order to rescue the property which is the subject-matter of the execution. Thirdly, *if property is seized and the defendant appears and defends the case on the merits, the appearance is not involuntary*. But there are weighty dicta to the effect that an appearance merely in order to save property arrested or attached as a basis of the jurisdiction of the foreign court will not be regarded as voluntary at common law. Thus there may be cases in which the defendant may appear to oppose the seizure on jurisdictional grounds, e.g. where he denies he has property within the jurisdiction or where he challenges the validity of the seizure. In such cases, at any rate, the appearance should not be regarded as voluntary.

(Emphasis mine.)

In the present case, the defendant could have elected to ignore the proceedings in South Africa. If he had done so, the South African judgment would clearly not have been enforceable against him. However, if he had followed this course of action, he would have lost his property in South Africa even though there might have been no basis for jurisdiction of the South African court, or even though the seizure of his property was invalid. In my opinion, the defendant should have had the right to appear in the South African action for the purpose of (a) contesting the validity of the seizure of his property, or (b) contesting the jurisdiction of the South African court, without attorning to the jurisdiction of the South African court: see *The Dupleix*, [1912] P. 8; *Henry v. Geoprosco International Ltd.* at pp. 747-48; *Cheshire and North on Private International Law*, 10th ed. (1979), at p. 640; Beale, *A Treatise on the Conflict of Laws* (1935), vol. 1, para. 82.6, pp. 352-53.

There is no proof before us that it is possible in South Africa to enter a conditional or limited appearance. However, even if this is not possible under South African procedure, the defendant in his defence to the application for summary judgment or in his plea could have limited his defence to the two matters that I have mentioned. Instead, he chose to defend the action on the merits. Having done so, I think that his appearance was a voluntary one, notwithstanding the seizure of his property prior to the issue of the edictal citation. He is, therefore, bound by the South African judgment: see Read, *Recognition and Enforcement of Foreign Judgments* (1938), p. 161.

3. One of the cases mentioned in Henry v. Geoprosco is the decision of the House of Lords in Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., [1975] A.C. 591; [1975] 1 All E.R. 810 (H.L.). This is an unusual case in that it involves a defendant's argument that the plaintiff cannot sue in England because the matter has already been disposed of by a German court. In theory, the rules are the same for both plaintiff and defendant: the judgment of a foreign court will be recognized when the foreign court had jurisdiction in accordance with the rules of the recognizing court. In practice, the rules must operate differently. In commercial cases the issue of recognition, as the sole focus of the inquiry, arises only in cases where one party has obtained a foreign judgment and the other now wants to re-litigate the dispute over again. The issue here is one of issue estoppel, since the foreign judgment cannot, for technical reasons, be regarded as res judicata.

When the foreign court (or any court, for that matter) dismisses a plaintiff's claim, it may have done so on any one of a number of defences raised by the defendant: that the action was brought out of time; that another court is a more appropriate forum or the contractually chosen forum; that the pleadings are defective; that the judge believed the witnesses for the defence rather than those of the plaintiff; that no damages were suffered by the plaintiff; etc. When judgment has gone for the plaintiff, on the other hand, it must have been on the basis that all the arguments of the defendant have been dismissed. A judgment in favour of the defendant on one of the grounds raised by that party, still leaves it open to the plaintiff to try another attack on another basis. It is this fact - all too often ignored by those who discuss the topic - that creates, in part, the differences between recognition and enforcement.

It is for this reason that the plaintiff in Black-Clawson could start again after losing in Germany. The case raises some interesting issues and illustrates the inter-relation of choice of law and recognition of foreign judgments.

In Black-Clawson the German court had dismissed the plaintiff's claim because it was statute-barred under German law. The plaintiff therefore started proceedings in England. The defendant raised the German judgment, the question before the House of Lords was the scope of s. 8 of the Foreign Judgments Reciprocal Enforcement Act 1933. S. 8 is as follows:

> (1) Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognized in any court in the United Kingdom as conclusive between the parties thereto

in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.

(2) This section shall not apply in the case of any judgment:-(a) where the judgment has been registered and the registration thereof has been set aside on some ground other than - (i) that a sum of money was not payable under the judgment; or (ii) that the judgment had been wholly or partly satisfied; or (iii) that a the date of the application the judgment could not be enforced by execution in the country of the original court; (b) where the judgment has not been registered, it is shown (whether it could have been registered or not) that if it had been registered the registration thereof would have been set aside on an application for that purpose on some ground other than one of the ground specified in paragraph (a) of this subsection.

(3) Nothing in this section shall be taken to prevent any court in the United Kingdom recognizing any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before the passing of this Act.

In particular, the focus was on the phrase, "shall be recognized in any court ... as conclusive between the parties thereto in all proceedings founded on the same cause of action ..." in s. 8(1). The court regarded s. 8 as being only declaratory of the common law.

In giving judgment, Lord Wilberforce said:

> I find then, so far, no intelligible reason for supposing the common law to be changed. But the respondents say the words of the section are clear—clear words must be given effect to—conclusive means conclusive and that is that. This, however, I cannot accept. In the first place one has to ask, '*What* is conclusive?' The section says the 'judgment'—so what is 'the judgment'? The respondents say that the judgment is the dispositive—'the suit is dismissed'. If this is contained in a self-contained document, as in the English practice, one may not look beyond it. If in a comprehensive document, as in the German practice, only that part of it which states the disposition is the judgment, not the whole of the judgment showing what was decided or adjudicated on. But there is no warrant for this limitation. The courts in this country, when faced with a foreign judgment, whether in favour of the plaintiff or the defendant, in English proceedings, invariably look at the whole matter: the order made; the reasons; the nature of the rival claims, resorting if necessary to extrinsic evidence to explain them and to expose the reality. They do not confine themselves to the fact of the record, or to the formal order. It must be remembered that at common law foreign judgments do not give rise to an estoppel by record. If relied on by a plaintiff in an English court, they are so as obligations, which the defendant ought to discharge: so the nature of the obligation must be made known and if necessary explained. If they are relied on by a defendant as a bar in English proceedings, the nature of the bar must be enquired into, from an inspection of the matter adjudicated on. *Harris v Quine* itself is an example of this. One can cite many passages of authority:
>
> > 'In general, in pleading a foreign judgment you produce it with the proceedings to shew it is a judgment between the same parties and on the same matters.'
>
> (*Ricardo v Garcias* per Lord Lyndhurst LC.)
>
> > 'Every plea of a former judgment in bar ought to set forth so much, at least, of the judgment as would shew that it was final and conclusive on the merits.'

'No one contends that the judgment and the proceedings should be set out in full, but we should have such a description of them as would enable us to know what was decided.'

(Ibid per Lord Brougham.) So, in my opinion, to say that in a case such as the present the English court must stop at the first line of the German judgment and ignore the rest is irrational and out of line with what the courts do. And then 'conclusive': conclusive of or as to what? The respondents say 'conclusive that the cause of action on which the foreign proceedings were brought no longer exists'. But the subsection does not say this: the words 'in all proceedings founded on the same cause of action' merely describes the occasion on which the conclusiveness arises. There is nothing here—and, I add in passing, nothing in Part I of the Act—to indicate that the conclusiveness is to extend, irrespective of what the judgment decided, to the whole of the cause of action. Why should we give to the judgment a greater force than it receives by the law of the country where it is given? Certainly the law of Germany does not say that the cause of action does not exist.

In my opinion, therefore, an interpretation of both 'judgment' and 'conclusive' which would require courts in this country to examine the judgment, see what it decided, and hold it conclusive as a judgment and for what it adjudicates, is both open on the language and is entirely consistent with the common law. To quote another leading authority: 'As to whatever it meant to decide, we must take it as conclusive' (*Bernardi v Motteux* per Lord Mansfield).

The appellants finally relied strongly on the wording of s 8(3) of the 1933 Act. I agree with my learned and noble friend Lord Simon of Glaisdale in the reasons he has given why this subsection is of no assistance and shall not repeat them in words of my own.

In my opinion, if this case had arisen at any time between 1869 and 1933 there could be no doubt how it would have been decided. I see no reason why the 1933 Act should be understood as intending to bring about a different result. The language of s 8(1) does not so compel. The German judgment would be conclusive for what it decided and for nothing more. The appellants' claim has not been decided on the merits, and they should be allowed to pursue it. This being my conclusion on the second point, it is not necessary to decide the first. I prefer to reserve my opinion on whether s 8(1) applies to defendants' judgments.

The decision of the German court was reached in the following way (as described by Lord Wilberforce):

3. In Germany, a three year period of limitation applies to bills of exchange. If the German period is applied to the bills, action on them is barred by German law. The question litigated in Germany, on which the German courts have differed, is whether in proceedings before a German court the German period does apply. The basis of the affirmative decision of the District Court of Munchen is (briefly) that limitation is, under German law, classified as a matter of substance, not of procedure; that as the proper law of the bills is English law, this involves the application by a German court of English law; that under English law limitation is regarded as a matter of procedure; that, applying the doctrine of renvoi (accepted by the German court), reference back has to be made to the lex fori, i e German law, so that the proceedings were barred.

4. According to expert evidence, German law, though classifying limitation as a matter of substance, did not, in relation to the subject-matter of dispute, extinguish the right, but did affect the remedy. As this point is crucial, I quote certain passages from the evidence filed on behalf of the respondents:

'In German law what is described in England as the limitation of actions does not extinguish the right. Nonetheless such limitation is a matter of substance, not of procedure.' [Dr F A Mann.]

'The completion of the limitation affects the substantive quality of the right. Notwithstanding the limitation, it is true the right remains in existence. Its effect, however is weakened by the fact that the obligor is entitled permanently to refuse performance.' [Professor Hefermehl, commenting on the German Civil Code, s 222, cited by Dr F A Mann.]

'. . . the position is that, while the debts under the bills are not extinguished, the defendants are under no duty to pay them because they have a permanent answer to them'. [Dr F A Mann.]

B. 3. Recognition and Enforcement. 2. Common Law Rules...

If we are going to understand the judgment and what it means we have to get behind the German judgment and ask what it really decided. To do this we have to consider the purpose of a limitation period. One stated purpose of such a rule is given by the Ontario Law Reform Commission.

> Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace".

(Report on Limitation of Actions, 1969, at p. 9.)

To what extent does the decision of the German court represent a decision based on the need for a purposive application of the German legislation? If the German court was not making a purposive application, what was it doing? If we don't know what the German court was doing, how can we possibly make sense of what effect the judgment should have? If the German court, on the other hand, was saying that the plaintiff's action should be barred because any other result would be unfair to the defendant then surely the judgment should be recognized as being dispositive of the merits of the case. The plaintiff by choosing the German court cannot reasonably complain if it decides that his action is unfair to the defendant and dismisses its claim.

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no practical difference, in effect, between such a judgment and a judgment for a debt, and the distinction so much insisted on in the authorities referred to would be of no real consequence.

In my opinion the rule stated by Dicey quoted above, that the courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immovable not situate in such country, and the statement in the authorities referred to, that controversies in reference to land can only be decided in the state in which it depends, and that judgments of foreign courts purporting to deal with the title and with rights to lands in another country can only be enforced by proceedings *in personam*, shew that the judgment of the court of California here in question does not, in British Columbia, affect the title to the lands in question, and is not a judgment that should be enforced by the courts of British Columbia as binding there on the parties.

The appeal should be allowed, and the action dismissed, with costs to defendants throughout.

Appeal allowed with costs.

Questions and Notes

1. What alternative course of action is the Supreme Court suggesting the parties should take? Should three Californian residents, disputing the validity of a Californian contract, be forced to litigate in British Columbia?

2. Would it have mattered to Smith, J. if the facts supporting the jurisdiction of the California court might have fitted within one of the exceptions to the rule found in the Moçambique Case? The relevant exception would be the first, i.e., that the issue arose out of a contract governed by California law.

3. As between the Dukes and vendors, does the British Columbia court have a valid concern for the correct choice of law rule? Should the Supreme Court require a finding that the California court got the British Columbia law wrong? What if it were shown that the Californian court correctly applied British Columbia law, would Smith still require a retrial of the same issue in British Columbia?

4. What is the precise objection of the Supreme Court to the enforcement of the California judgment (as opposed to the bringing of an action on the original cause of action)? What

Notes

1. Is the defendant given a defence to an action on the "original judgment" (s. 3(6)(g)) or a defence to the "original cause of action", thereby circumventing the preclusion doctrine?

2. What is the basis for the plaintiff's claim:

a common law rule;

a provincial statutory rule; or

a federal statutory rule?

3. On what grounds can an Alberta court justifiably refuse to enforce a judgment of a British Columbia court in this case? The judgment of the latter court was based on a federal statute, the Criminal Code, the precise exercise of the power having been upheld by the Supreme Court of Canada in R. v. Zelensky, [1978] 2 S.C.R. 940, 86 D.L.R. (3d) 179. An Alberta court has exactly the same power to make an order for restitution as has the British Columbia court. What has the source of the fraud (i.e., the gambling transaction) to do with the issue of enforcement?

The Uranium Cartel and other Matters - A Reprise

The objections of some of the members of the Uranium Cartel took the form of an express legislative remedy should any of the anti-trust proceedings in the American courts be successful. There has been legislation passed in Australia (Foreign Proceedings Act, 1976),in the United Kingdom (Protection of Trading Interests Act, 1980), and recently in Canada as well (Foreign Extraterritorial Measures Act, S.C. 1984, c. 49).

The main point of these acts is to hamper the extraterritorial application of foreign antitrust laws when such application would be unduly onerous to a domestic corporaton. This type of legislation is really directed against the courts of the United States which are notorious for awarding huge damages awards against foreign concerns having assets within the United States.

The principal provisions of the Canadian act are section 3, which permits the Attorney General to prohibit or restrict the production of Canadian documents in a foreign court or tribunal, section 5, which permits the Attorney General to prohibit a